
ORDINARY MEETING

OF

TRANSPORT AND URBAN DEVELOPMENT COMMITTEE

SUPPLEMENTARY AGENDA

Time: 9.15am
Date: Thursday, 25 June 2015
Venue: Committee Room 1
Ground Floor, Council Offices
101 Wakefield Street
Wellington

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3. General Business

SUBMISSION ON THE BUILDING ACT EMERGENCY MANAGEMENT PROPOSALS

Purpose

1. The Government is proposing changes to the emergency management powers under the Building Act 2004 (the Building Act). The draft submission on these changes is attached.

Summary

2. A number of changes are proposed to the emergency powers within the Building Act as a result of the Christchurch earthquakes and the experience of managing buildings within the context of a civil defence emergency.
3. These aim to clarify powers and processes, so that public safety can be protected, that owners and users of buildings have more certainty about the process in the event of a disaster, and they create a process to ensure heritage factors are considered in situations where urgent action is needed on a building that poses a risk to life.
4. The proposals provide local authorities with powers and processes to act in the 12 month period following the state of emergency.
5. Officers support the majority of the proposals and consider that this will improve emergency management. There are a number of areas which need definition or if they are not defined they risk being tested in practice.

Recommendations

That the Transport and Urban Development Committee:

1. Receive the information.
2. Approve the Council's submission (Attachment 1) on the proposals for changes on Building Act Emergency Management.
3. Agree to delegate to the Chair of the Transport and Urban Development Committee and the Chief Executive the authority to amend the submission to include any amendments agreed by the Committee and any associated minor consequential edits.

Background

6. The current system for managing buildings is covered by the Civil Defence Emergency Management Act 2002 (CDEM Act) and the Building Act.
7. The CDEM Act provides broad powers to manage buildings during declared states of emergency. Under these powers, buildings are rapidly assessed, and access is restricted where buildings are assessed as unusable. For some unusable buildings, further assessment is recommended to clarify the risk. The CDEM Act also provides powers to undertake building work (including demolition). All powers to manage buildings under the CDEM Act cease to have effect when states of emergency end.

8. The Building Act provides powers to manage buildings which are deemed dangerous or insanitary. A dangerous building is defined (in part) in the Building Act if in the ordinary course of events (excluding the occurrence of an earthquake), the building is likely to cause
 - injury or death (whether by collapse or otherwise) to any persons in it or to persons on other property; or
 - damage to other property.
9. Territorial authorities have powers to manage dangerous buildings and can carry out or require work to be done on these buildings under the Building Act.
10. These powers are set out below.

| | Civil Defence Emergency Management Act 2002 | Building Act 2004 |
|---|--|--|
| When it can be used | During a declared state of emergency under sections 66 or 68 of the Civil Defence Emergency Management Act 2002. | Any time |
| Provisions to manage unusable buildings | <p>Section 85 A Civil Defence Group, or delegated authority such as a Controller, have the powers to carry out or require to be carried out works; or removing or disposing of, or securing or otherwise making safe, dangerous structures and materials wherever they may be.</p> <p>Section 86 A Controller may evacuate and exclude persons from any premises or place.</p> <p>Section 91 A Controller, police officer, or person under authority of a Controller may direct any person to stop an activity or request any action to prevent or limit the extent of the emergency (this may include the owner or occupier of a building).</p> <p>Section 92 Civil Defence Controllers may examine, secure or destroy any property in order to prevent or limit the extent of the emergency.</p> | <p>Sections 121 – 129 Territorial authorities have powers to manage dangerous, affected, earthquake-prone and insanitary buildings as defined in the Act. Territorial authorities can require work to be done, or carry out work themselves.</p> |

Issues with the current post –disaster framework

11. The powers under the CDEM Act that are available during the state of emergency to manage buildings cease at the end of that state of emergency. This includes the powers to inspect buildings, restrict access and undertake building work. It is unlikely that all building issues identified during the state of emergency will have been resolved under the state of emergency.

12. The Building Act provides insufficient powers to continue to manage all buildings that were managed under the broad powers in the CDEM Act, because immediately after a state of emergency there could still be:
 - urgency and strained resources: rapid assessments made in uncertain conditions may be insufficient evidence for using Building Act powers
 - extraordinary events: there could be a high risk of subsequent extraordinary events or earthquakes but Building Act powers to manage dangers do not apply to such events.
13. There is a need for transitional powers between the CDEM Act and the Building Act functions. The current system does not provide clarity and smooth management of unusable buildings after a state of emergency is lifted.
14. After the Canterbury Earthquakes in 2010 and 2011, this gap in powers was addressed by Orders in Council made under special legislation. Issues with restrictions on removing or de-constructing buildings also led to uncertainty and delays in managing unsafe buildings after the Canterbury Earthquakes.
15. Following the Gisborne earthquake in 2007, the post-disaster management system required local authorities to place placards during the two day long state of emergency, then re-assign placarded buildings with dangerous building notices under section 124 of the Building Act once the state of emergency had ended – a duplication of effort during a time when resources were stretched and would likely be in any future event.

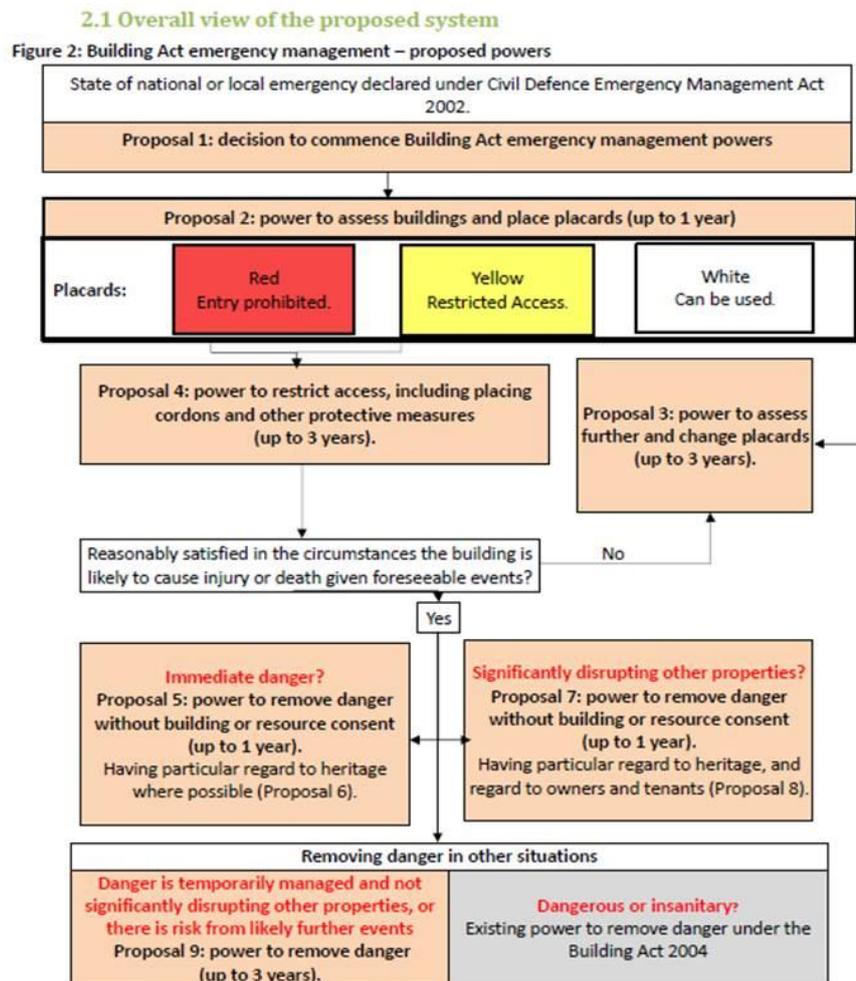
Royal Commission recommendations

16. The Royal Commission of Inquiry into Building Failure caused by the Canterbury Earthquakes (the Royal Commission) recommended the following changes.
 - clearer powers to manage building risks during state of emergency timeframes
 - an enhanced risk-based building safety evaluation regime, to commence in states of emergency and continue after states of emergency
 - increased clarity and certainty on who, when and where risk-based building safety placarding and protective measures (e.g. fall-zones) are established during states of emergency as well as provision for keeping these in place until the risks are fully followed-up
 - transition mechanisms from states of emergency to post-states of emergency situations, including the continuation of building safety placards and protective measures
 - stronger powers, after states of emergency end, for pre-emptive management of likely building life-safety risks, including the demolition or deconstruction of heritage buildings, and damaged buildings creating off-site risks, without requiring normal authorisations.
17. The proposed changes respond to these issues and recommendations.

The Proposed Changes

18. The Ministry of Business, Innovation and Employment (MBIE) is proposing amendments to the Building Act to provide a more orderly transition from a state of emergency declared under the CDEM Act where the scale of building damage and risk is significant.

19. These amendments are referred to as the building emergency management powers and are intended to be used after any type of event, including earthquake, flooding, wind events or volcanic eruption, that have resulted in a state of emergency.
20. The key objectives of the powers are to protect people from life-safety and injury risks from buildings after an emergency while minimising disruption of the services provided by buildings.
21. The powers will, in some circumstances, override processes contained in the Resource Management Act 1991 and the Building Act. They do not override provisions of any other current legislation.
22. The following diagram sets out the proposed system and the nine proposed changes.



23. The nine proposed changes are as follows.

| | |
|-----------------------------------|---|
| 1 | <p>A Civil Defence Controller may decide whether to use Building Act emergency management powers.</p> <p>The building emergency powers are divided into those that can be renewed for up to one year and those that are available for up to three years after the state of emergency has ended. Every 28 days after the end of the state of emergency, the territorial authority must decide whether to continue using those powers that can be renewed for up to one year.</p> |
| 2 | <p>Territorial authorities have powers to do assessments and place placards.</p> <p>Territorial authorities have powers to do, or authorise, assessments during a state of emergency and up to one year after the state of emergency has ended. The power is reviewed every 28 days for up to 1 year after the state of emergency has been terminated.</p> <p>Territorial authorities may place placards as a result of the assessment which will state the restrictions and requirements imposed on the buildings. Placards will be valid for three years after the state of emergency has been terminated.</p> |
| 3 | <p>Power to assess further and change placards.</p> <p>Territorial authorities may require further assessments and change placards placed as a result of any previous assessments. Territorial authorities may undertake these assessments if necessary. The power is available for up to 3 years after the state of emergency has terminated.</p> |
| 4 | <p>Territorial authorities have powers to restrict access including placing cordons and other protective measures (up to 3 years).</p> <p>Territorial authorities can restrict access based on assessments up to three years after the state of emergency has been lifted. The placards placed on the building will state the restrictions and requirements imposed.</p> |
| REMOVING IMMEDIATE DANGERS | |
| 5 | <p>Resource or building consents will not be required to remove significant or immediate dangers.</p> <p>A territorial authority will not require resource consent or building consent where urgent work is required to reduce or remove significant and immediate dangers for up to one year after the state of emergency has ended.</p> <p>After issuing a warrant to remove significant and immediate dangers, territorial authorities may begin, or require work to begin, immediately.</p> |
| 6 | <p>Heritage values will be taken into account where possible when removing significant or immediate dangers.</p> <p>Territorial authorities should seek to preserve heritage values where possible. Before issuing a warrant to undertake work to remove significant and urgent dangers, a territorial authority must:</p> <ul style="list-style-type: none"> • Obtain the approval of the Minister for Building and Housing, in consultation with the Minister for Arts, Culture and Heritage, for any buildings listed in district plans that are National Historic Landmarks, or Category 1 Historic Places. • Give at least 24 hours' notice (where possible) to Heritage New Zealand Pouhere Taonga, and have particular regard to its advice in respect of heritage buildings individually listed in district plans, and buildings that are subject to a heritage order or covenant. |

| REMOVING DANGERS CAUSING SIGNIFICANT DISRUPTION | |
|--|---|
| 7 | <p>Resource or building consents will not be required to remove dangers causing significant economic disruption.</p> <p>Territorial authorities will not require resource or building consents when reducing or removing dangers causing significant economic disruption for up to 1 year.</p> <p>Before issuing a warrant to undertake or require work to remove dangers causing significant economic disruption:</p> <ul style="list-style-type: none"> • The territorial authority must take reasonable steps to give notice to owners and tenants of the building, and owners and tenants of properties whose access is affected by the building. • The parties will have the right to apply to the chief executive of MBIE for a determination where they dispute the issuing of the warrant. • After issuing the warrant, the territorial authority must not commence the work for 48 hours (providing further opportunity for parties that dispute the warrant to seek a determination). |
| 8 | <p>Heritage values will be taken into account where possible when removing danger causing significant economic disruption</p> <p>Territorial authorities should seek to preserve heritage values where possible.</p> <p>Before issuing a warrant to undertake work to remove significant and urgent dangers, a territorial authority must:</p> <ul style="list-style-type: none"> • Obtain the approval of the Minister for Building and Housing, in consultation with the Minister for Arts, Culture and Heritage, for any buildings listed in district plans that are National Historic Landmarks, or Category 1 Historic Places. • Have particular regard to advice from Heritage New Zealand Pouhere Taonga for any other heritage buildings listed in district plans, and buildings that are subject to a heritage order or covenant. HNZPT will be allowed at least two weeks to provide their advice. |
| REMOVING DANGER IN OTHER SITUATIONS | |
| 9 | <p>Power to remove danger in other situations</p> <p>Territorial authorities can undertake or require work to reduce or remove dangers in situations where danger to people is being managed temporarily (e.g. by cordons) and is not significantly disrupting other properties, for up to three years after the state of emergency has ended.</p> <p>This power requires territorial authorities to use the normal resource and building consent processes under the Resource Management Act 1991 and the Building Act 2004.</p> |
| OTHER PROVISIONS | |
| 10 | <p>Appeals</p> <p>Appeals to the Chief Executive of MBIE about territorial authorities' building actions or omissions will be available in most situations.</p> <p>Building owners will be able to apply for a determination against territorial authorities under section 177 of the Building Act regarding the use of building emergency management powers in most situations.</p> |
| 11 | <p>Liability</p> <p>Territorial authorities and assessors authorised by the territorial authority, will be under no liability arising from any action that they take in good faith under building emergency management powers.</p> |

| | |
|----|---|
| 12 | <p>Costs</p> <p>Owners will be liable for most costs associated with the building emergency management powers. Territorial authorities have the power to recover costs from owners for any work done.</p> <p>Territorial authorities are responsible for the costs of the initial rapid building assessments and for cordons and restrictive measures for up to three months after the state of emergency has been lifted.</p> |
| 13 | <p>Compensation</p> <p>Owners will be liable for most costs associated with the building emergency management powers, but can seek compensation for actions where the action caused disproportionately more harm than good.</p> |
| 14 | <p>Offences</p> <p>It will be an offence, with a fine of up to \$5,000 for an individual and \$50,000 for a body corporate, to interfere or not comply with protective measures and placards.</p> <p>It will be an offence, with a fine of up to \$200,000, not to comply with a notice to remove danger, or to use a building in breach of the directions on a placard.</p> |

24. In general, officers support the changes proposed by MBIE and agree that these will provide more certainty for both Territorial Authorities and building owners during and after an emergency event.
25. There is an issue where a Council, such as Wellington employs its own heritage advisors and is bound under these proposals to take advice from Heritage New Zealand.
26. There are some gaps for buildings which are not covered by the safeguards in this in the proposals. This includes buildings:
 - listed by Heritage New Zealand but not listed within the District Plan, and
 - others that would normally require resource consent such as within heritage areas.
27. There are some areas where timeframes and processes could be further defined such as the process for receiving a determination from the Chief Executive of MBIE when a decision is appealed so that this does not slow the process of removing some dangers. Similarly greater clarity could be provided where approval is required with heritage buildings.
28. The draft submission from the Council is attached.

Next Actions

29. When the submission is finalised it will be submitted to MBIE. This is due by 5pm Friday 24 July.

Attachments

Attachment 1. Submission on Building Act Emergency Management Proposals

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| Author | Geoff Lawson, Principal Programme Adv, Policy, |
| Authoriser | Greg Orchard, Chief Operating Officer |

SUPPORTING INFORMATION

Consultation and Engagement

This is part of a MBIE consultation.

Treaty of Waitangi considerations

Not applicable

Financial implications

Not applicable

Policy and legislative implications

This is part of MBIE's policy and legislative programme.

Risks / legal

These proposals will change the emergency powers the Council holds in the event of an emergency.

Climate Change impact and considerations

Not applicable

Communications Plan

Not applicable

Building Act Emergency Management Proposals

| | |
|---|---|
| Proposals and Questions Feedback Form Feedback form completed by: | |
| First Name | |
| Last Name | |
| Are you responding as an individual or on behalf of an organisation (please circle one) | Organisation Wellington City Council |
| Email Address | |
| Signature | |
| Date | |

Publication of submissions, the Official Information Act and the Privacy Act

MBIE intends to publish a summary of submissions on its website. MBIE will not publish the content of your submission.

However, your submission will be subject to the Official Information Act 1982 and may therefore be released in part or full, if requested. The Privacy Act 1993 also applies. When making your submission, please state if you have any objections to the release of any information contained in your submission. If so, please identify which parts of your submission you request to be withheld and the grounds under the Official Information Act for doing so (e.g. that it would be likely to unfairly prejudice the commercial position of the person providing the information).

For guidance on the Official Information Act, refer to www.ombudsman.parliament.nz/resources-and-publications/guides/official-information-legislation-guides

What happens next?

After the consultation period finishes, MBIE will analyse feedback and submissions and report back to the Government. The Government will then make decisions on policy proposals for a building emergency management system.

If adopted, the proposals will require legislative change to the Building Act 2004. This would provide further opportunity for public input through the select committee process. Depending on other legislative priorities, changes could be introduced in 2015 or 2016.

Contacts

For further information please email buildingactemergencymanagement@mbie.govt.nz

To help ensure your feedback is understood, when answering the questions please provide evidence and/or examples for your response where possible.

Using the Building Act emergency management powers

Proposal 1 – A Civil Defence Controller may decide whether to use Building Act emergency management powers.

During a state of emergency declared under the CDEM Act, a controller appointed under that Act may decide whether to use Building Act emergency management powers.

The controller must give consideration to the following factors:

- a) significance of the scale of the damaging events
- b) reasonably foreseeable likelihood of further related damaging events which could pose risks to life-safety
- c) distance and direction of the damaging event or hazard, or possible events or hazards, and impacts in relation to buildings in built-up areas
- d) observed scale of structural damage to buildings
- e) information available about building and ground conditions
- f) need for shelter in residential buildings
- g) likely scale of structural damage to buildings
- h) likely scale and risk to life-safety from buildings
- i) advice and information from relevant territorial authorities, suitably qualified persons, and relevant government agencies
- j) credible discoveries or disclosures about risks from buildings
- k) the territorial authority's ability to manage risks adequately without building emergency management powers.

The building emergency powers are divided into those that can be renewed for up to one year and those that are available for up to three years after the state of emergency has ended. Every 28 days after the end of the state of emergency, the territorial authority must decide whether to continue using those powers that can be renewed for up to one year.

To help ensure your feedback is understood, when answering the questions please provide evidence and/or examples for your response where possible.

1. Are the considerations that must be taken into account appropriate? Why / Why not?

Yes. There is a significant amount of experience in NZ that demonstrate that these proposed changes are appropriate and allow for a smooth transition from the emergency to recovery.

However in the proposal it states that "During a state of emergency declared under the CDEM Act, a controller may decide whether to use the Building Act Emergency Powers". This is a significant departure from the present situation. Currently the controller has authority to make discretionary decisions on a wide range of matters including the closure and or demolition of buildings, and these decisions are not subject to appeal during the emergency. It needs to be clear whether the rights of appeal apply within the

period of the state of emergency or for actions taken by a territorial authority following the ending of the state of emergency.

For instance, a controller may wish to act on a situation causing significant disruption during the state of emergency but could be subject to appeal during this process. Under the proposals, the controller can only act in situations causing immediate danger.

The Council suggests that the list of factors should be supported by a clear expression of statutory purpose, which could be common (or at least consistent) between relevant parts of the CDEM Act and the Building Act. This would assist with the interpretation of the list of factors and the controller's related decision-making. For example, the legislation could clarify that the power to invoke the Building Act emergency management powers should be made to protect people from life-safety and injury risks from buildings after an emergency and/or to minimise disruption of the services provided by buildings. Such an approach will also help to clarify that other matters that could potentially be considered by the controller - such as the possible impact of the exercise of emergency management powers on built heritage - are not relevant to the discretion to invoke the Building Act emergency management powers (notwithstanding that they may be relevant in the context of later decision-making as the emergency management powers are exercised).

2. *Is 1 year an adequate length of time for the powers that enable territorial authorities to make initial building assessments and take action to reduce or remove more immediate risk? If not, what length of time would be more appropriate and why?*

Yes. WCC considers that the proposed 1 year timeframe is adequate, based on experience of post-emergency management in Christchurch. Any event requiring powers beyond this timeframe is likely to be so large that special empowering legislation would be required.

Nevertheless, WCC considers that there may be some benefit in providing a degree of flexibility around the timeframe, to accommodate unforeseen circumstances. For example, the legislation could provide for a 1 year timeframe as the default position, with scope for the controller to vary (ie to shorten or lengthen) that timeframe at his/her discretion, after considering the factors relevant to the decision to invoke the Building Act emergency management powers.

3. *Is 3 years an adequate length of time for the remaining powers to stay in force? If not, what length of time would be more appropriate and why?*

Yes we agree that 3 years is an adequate length of time and, as above in 2), if the event required powers beyond this it is likely to be so large that special empowering legislation would be required or there will be sufficient time to use normal Building Act powers. A 3 year period should provide sufficient time for territorial authorities to plan, resource and implement standard BA04 enforcement powers before the placard system expires.

4. *Is the requirement to review the proposed 1 year powers every 28 days appropriate? Why / Why not?*

No. The Council considers that this period may be too short. The period of 28 days is likely to be difficult to manage and it will come round very quickly. While flexibility should be retained, WCC considers that a 2 or 3 month review period would be more appropriate. As above, the legislation could provide for the controller to vary (ie to shorten or lengthen) that timeframe at his/her discretion, after considering the factors relevant to the decision to invoke the Building Act emergency management powers.

It will depend to some extent on the scale of the emergency. In many cases a 28 day period is assumed will cover the emergency, however in the event of a large scale emergency renewal every 28 days seems onerous. An option might be to have an option to seek Ministerial agreement for a longer period where it is needed for an emergency event of some scale with the provision to shorten this period as required.

5. *Is it appropriate to link the building emergency powers to a state of emergency? Why /Why not?*

Generally, yes. WCC acknowledges that a default threshold for invocation of the powers is necessary and that the declaration of a state of national or local emergency is appropriate in that regard.

This response is subject to the comments in relation to question 6 below.

Whilst it may be appropriate the linking of Acts could result in confusion; does the controller retain the full powers under the CDEM Act or would these powers be diluted by the Building Act Emergency Powers?

There needs to be explicit direction regarding the appropriate use of the building emergency powers under a state of emergency, including clarity on the scope of the appeals process affecting decisions.

In the absence of any guidance on the relationship and hierarchy of powers and appeal process the controller would have to be explicitly clear about which decisions are made under which powers, otherwise decisions made under the CDEM Act could be challengeable under the Building Act Emergency Powers appeals provisions.

6. *Are there situations when a state of emergency has not been declared when the building emergency management powers should be made available? Please provide examples.*

Yes. WCC considers that situation could arise where the availability of the building emergency management powers is appropriate, where a state of national or local emergency has not been declared.

By way of example, WCC needed to deal with a damaged and unused liftshaft attached to a building following the Seddon earthquakes in mid-2013. The liftshaft had the potential to topple onto adjacent buildings and was being affected by aftershocks. At that time, the Building Act's powers in relation to 'affected buildings' had not been enacted. The situation was ultimately resolved by the use of powers under section 129 of the Building Act and the voluntary evacuation of people from nearby buildings. The

situation could have been addressed in a more straightforward manner if the building emergency management powers had been available.

There are number of issues that would need to be clarified including who holds these powers in these situations and how such a situation would be authorised.

Powers to assess buildings and restrict access

Proposal 2: Territorial authorities have powers to do assessments and place placards.

Territorial authorities have powers to do, or authorise, assessments during a state of emergency and up to one year after the state of emergency has ended. The power is reviewed every 28 days for up to 1 year after the state of emergency has been terminated.

Territorial authorities may place placards as a result of the assessment which will state the restrictions and requirements imposed on the buildings. Placards will be valid for three years after the state of emergency has been terminated.

Proposal 3: power to assess further and change placards.

Territorial authorities may require further assessments and change placards placed as a result of any previous assessments. Territorial authorities may undertake these assessments if necessary. The power is available for up to 3 years after the state of emergency has terminated.

Proposal 4: Territorial authorities have powers to restrict access including placing cordons and other protective measures (up to 3 years).

Territorial authorities can restrict access based on assessments up to three years after the state of emergency has been lifted. The placards placed on the building will state the restrictions and requirements imposed.

To help ensure your feedback is understood, when answering the questions please provide evidence and/or examples for your response where possible.

7. *Should territorial authorities have the powers to continue to assess buildings and place placards for up to one year after the state of emergency has ended? Why / Why not?*

Yes. This allows for the state of emergency to be uplifted while allowing for an orderly transition from the emergency to recovery. Without this power it is likely that a state of emergency will need to be extended just to cover possible building damage being uncovered. This also appropriately recognises that the impacts of an emergency event on the built environment may take much longer to assess and address than other post-emergency response activities.

The Council endorses the creation of a clear legislative pathway for the review and, where appropriate, change of placards. The ability to reverse, supersede or otherwise alter notices issued under regular Building Act enforcement provisions is often assumed but is not necessarily legally clear, which can become an issue whether downstream enforcement is required (eg prosecution for failure to comply with an amended notice)

8. Should territorial authorities be able to restrict access to buildings on the basis of an assessment? Why / Why not?

Yes. The Council considers that this is fundamental to the effectiveness of the proposed placard regime and the underlying objective of protecting people from life-safety and injury risks from buildings after an emergency. Territorial authorities should be able to restrict access as this is a public safety issue. The Council acknowledges that a decision to place a placard on a building will be made on the basis of a relatively rapid assessment. However, it considers that is justified from a risk perspective. The balance is appropriately maintained by the owner's presumed ability to commission a more detailed assessment, which could result in the removal/uplifting of a placard.

9. Do you agree with the Royal Commission prioritisation of further assessments as outlined in Figure 4 (on page 19) of the Consultation document? Do you consider an alternative model could be used, and if so what is it?

Yes. The Council considers that the model shown in Figure 4 is appropriate and that it will be effective in most situations. The Council queries whether there may be other buildings in Group 1 that deserve a detailed evaluation, notwithstanding that no significant damage may be apparent. This could include buildings;

- of significant size or complexity
- with important post-emergency functions, or
- located on a strategic route.

The framework should not discourage owners from obtaining their own detailed engineering (or other expert) assessments as soon as possible after an emergency event. There is a risk that owners will place undue reliance on rapid assessments: eg regarding them as evidence that there has been no loss in building load capacity etc.

Removing immediate dangers

Proposal 5: Resource or building consents will not be required to remove significant or immediate dangers.

A territorial authority will not require resource consent or building consent where urgent work is required to reduce or remove significant and immediate dangers for up to one year after the state of emergency has ended.

After issuing a warrant to remove significant and immediate dangers, Territorial Authorities may begin, or require work to begin, immediately.

Proposal 6: Heritage values will be taken into account where possible when removing significant or immediate dangers.

Territorial authorities should seek to preserve heritage values where possible.

Before issuing a warrant to undertake work to remove significant and urgent dangers, a territorial authority must:

- Obtain the approval of the Minister for Building and Housing, in consultation with the Minister for Arts, Culture and Heritage, for any buildings listed in district plans that are **National Historic Landmarks, or Category 1 Historic Places.**
- Give at least 24 hours' notice (where possible) to Heritage New Zealand Pouhere Taonga, and have particular regard to its advice in respect of heritage buildings individually listed in district plans, and buildings that are subject to a heritage order or covenant.

To help ensure your feedback is understood, when answering the questions please provide evidence and/or examples for your response where possible.

10. Should territorial authorities be able to do building work to remove immediate life-safety risks without the requirement for a resource or building consent? Why / Why not?

Yes. The Council considers that this is appropriate where the power is exercised to remove or mitigate significant life-safety risks. The Council agrees that it is important to temper the powers provided to ensure that an appropriate balance is struck between public safety, private property rights, and other public goods (such as heritage protection). The Council considers that the proposed balance is appropriate. The exclusion of access to the determination process is an important consideration in that regard. It is unclear from the consultation document whether there will also be an exclusion of other mechanisms to challenge territorial authority decisions, such as applications for judicial review in the High Court (usually prevented by section 182(1) of the Building Act).

In the context of building consents, WCC observes that the need for a consent when emergency powers are exercised is already excluded by section 41(1)(e) of the Building Act. A specific override of any resource consent requirement is consequently a more

substantial policy change. It is noted that this proposal only provides safeguards for those buildings that are listed in district plans that are National Historic Landmarks, or Category 1 Historic Places or are heritage buildings individually listed in district plans, and buildings that are subject to a heritage order or covenant. It does not cover other buildings where a resource consent would normally have been required for demolition for example, for heritage area, urban design or character protection reasons.

The proposed approach does not appear to acknowledge the functional, cultural and economic role of heritage and character areas in our urban centres (relevant nationally as well as in Wellington). For example, the Wellington community places a high value on the Cuba Street, Courtenay Place and Newtown Heritage Areas but the collective value of these areas is not provided for under these proposals.

There are only 3 Category 1 heritage buildings within these three heritage areas so Proposal 6 will not cover them. A worst case scenario could involve a significant number of these buildings being demolished without there being a first stage process to determine whether there were other options before demolition.

11. Is it appropriate to have Ministerial approval before undertaking work on any buildings listed in district plans that are National Historic Landmarks, or Category 1 Historic Places? Why / Why not?

Yes given the potential loss of heritage values at stake. WCC considers that this check on the power to remove or mitigate dangers is appropriate.

WCC considers that a timeframe should be specified for Ministerial responses, after which a territorial authority should be able to take action if no responses are received. Given the risks involved, this timeframe will necessarily be relatively short. It may be appropriate to have a tight range of criteria if immediate work on a listed heritage building is required which may allow restricted work to proceed immediately, such as removal of high risk features over a public space.

12. Is it appropriate for territorial authorities to give at least 24 hours' notice (where possible) to Heritage New Zealand Pouhere Taonga (HNZPT), and have particular regard to its advice when considering actions on heritage buildings that are listed on district plans and/or subject to a heritage order or covenant? Why / Why not?

Yes, so long as "where possible" and "24 hours' notice" is defined and clearly understood. This implies that the Council may not give this notice presumably if action is required within this timeframe. The Council considers that this check on the power to remove or mitigate dangers is appropriate.

With larger councils like Wellington that have heritage advisors on staff, advice can be provided directly to the Controller about all items listed in the District Plan. Heritage New Zealand will not necessarily have records of places assessed for inclusion in the District Plan by the Council itself if they are not on the New Zealand Heritage List. Likewise, not all Category 1 and 2 buildings are listed on District Plans which would exclude them from this process.

The Council would like to see greater recognition of Council planning/heritage staff collaborating with Heritage New Zealand to have the best information and advice available before a warrant for demolition is issued.

The Council also observes that there may be heritage protection authorities (under the Resource Management Act 1991) other than Heritage New Zealand Pouhere Taonga (HNZPT). Provision should be made for notification of non-HNZPT heritage protection authorities, where they are linked to particular buildings by heritage orders.

As a general comment on Proposal 6, the Council notes that the proposed approach builds in an assumption that National Landmarks or Category 1 buildings (the Council notes the use of 'buildings' rather than historic place, historic area, wāhi tapu, or wāhi tapu area as per the HNZPT ACT 2014) listed in District Plans should be the focus of efforts to preserve heritage values. Whilst this might be understandable from an emergency management perspective, it will not be as clear from a heritage perspective. In Wellington's case, the Council has planned to have heritage staff on the ground after an event to enable considered decisions to be made about the appropriateness of demolition when there is a public safety issue.

If there were an event requiring a process for evaluating what buildings can and cannot be demolished in Wellington to be instigated, the Council would want to see greater weight given to the advice from our own internal planning and heritage teams, as well as HNZPT.

Removing dangers causing significant disruption

Proposal 7: Resource or building consents will not be required to remove dangers causing significant economic disruption.

Territorial authorities will not require resource or building consents when reducing or removing dangers causing significant economic disruption for up to 1 year.

Before issuing a warrant to undertake or require work to remove dangers causing significant economic disruption:

- The territorial authority must take reasonable steps to give notice to owners and tenants of the building, and owners and tenants of properties whose access is affected by the building.
- The parties will have the right to apply to the chief executive of MBIE for a determination where they dispute the issuing of the warrant.
- After issuing the warrant, the territorial authority must not commence the work for 48 hours (providing further opportunity for parties that dispute the warrant to seek a determination).

Proposal 8: Heritage values will be taken into account where possible when removing danger causing significant economic disruption

Territorial authorities should seek to preserve heritage values where possible.

Before issuing a warrant to undertake work to remove significant and urgent dangers, a territorial authority must:

- Obtain the approval of the Minister for Building and Housing, in consultation with the Minister for Arts, Culture and Heritage, for any buildings listed in district plans that are **National Historic Landmarks, or Category 1 Historic Places.**
- Have particular regard to advice from Heritage New Zealand Pouhere Taonga (HNZPT) for any other heritage buildings listed in district plans, and buildings that are subject to a heritage order or covenant. HNZPT will be allowed at least two weeks to provide their advice.

To help ensure your feedback is understood, when answering the questions please provide evidence and/or examples for your response where possible.

13. Should territorial authorities be able to remove dangers causing significant economic disruption without requiring resource or building consents? Why /Why not?

Yes. The Council considers that this power is appropriate and recognises that the balance of factors to be considered will be different to that arising in the context of significant life-safety risks.

The Council generally considers that the additional procedural safeguards described in relation to 'Proposal 7' are appropriate. However, it queries whether it is feasible to make a robust comparison between the costs of work to a damaged building (including potential demolition) and the 'economic costs of disruption being

mitigated'. The Council's experience in various contexts is that economic evidence can be uncertain and susceptible to competing interpretations. If a comparative economic evaluation is an essential element of territorial authority decision-making, then it is likely to create a significant degree of legal risk and propensity for challenge by building owners. That will detract from the usefulness of the proposed power and achievement of the underlying objectives.

14. *Is it appropriate to have Ministerial approval before undertaking work to remove dangers causing significant economic disruption on any buildings listed in district plans that are National Historic Landmarks, or Category 1 Historic Places? Why / Why not?*

Yes as per question 11 above. The process for this must be defined as this is likely to be required at short notice. A lengthy process may then result in the significant economic loss that it is seeking to mitigate and could defeat the purpose of this power.

15. *Is it appropriate for Heritage New Zealand Pouhere Taonga (HNZPT) to have at least two weeks to provide advice to territorial authorities on removing dangers causing significant economic disruption on any other heritage buildings listed in district plans and/or subject to a heritage order or covenant Why / Why not?*

No. WCC agrees that input from HNZPT (and, where relevant, other heritage protection authorities) is appropriate. However, an inflexible 2 week period for responses is not. WCC considers that this may be too restrictive. Instead, flexibility should be provided for a territorial authority to nominate a reasonable response period, having regard to all the circumstances relevant to the exercise of the power.

A lengthy process (at least two weeks) may result in the significant economic loss that it is seeking to mitigate and could defeat the purpose of this power.

As noted previously, the Council would also want to include its own heritage and planning staff in providing advice during this period so that the decision is not just about heritage values versus economic disruption but is about the overall functioning of the city.

16. *Should territorial authorities have particular regard to the advice of HNZPT? Why / Why not?*

Yes. WCC considers that HNZPT's views (and, where relevant, those of other heritage protection authorities) are inherently relevant. WCC queries whether any additional degree of weight is intended to be conferred by the requirement to 'have particular regard' to those views, rather than the more common requirements to 'have regard' or to 'have due regard' (see Building Act, section 121(2)(b)) to advice.

As outlined above, the Council also has its own heritage advisors on staff that can provide advice and have knowledge and familiarity with the inventory of all items listed in the District Plan. Heritage New Zealand will not necessarily have records of places assessed for inclusion in the District Plan by the Council itself if they are not on the New Zealand Heritage List.

Removing danger in other situations

Proposal 9: Power to remove danger in other situations

Territorial authorities can undertake or require work to reduce or remove dangers in situations where danger to people is being managed temporarily (e.g. by cordons) and is not significantly disrupting other properties, for up to three years after the state of emergency has ended.

This power requires territorial authorities to use the normal resource and building consent processes under the Resource Management Act 1991 and the Building Act 2004.

To help ensure your feedback is understood, when answering the questions please provide evidence and/or examples for your response where possible.

17. Should territorial authorities be able to remove danger using building emergency management powers in situations when it is not posing an immediate life-safety risk or a significant economic disruption? Why / Why not?

No. The Council considers that this would unduly infringes private property rights. This power should only be used where there is the likelihood of loss of life, damage to other property or significant economic disruption. Normal Building Act enforcement powers should be sufficient to manage buildings in non-emergency situations.

That said, the Council queries whether an amendment to section 121 of the Building Act would be useful, to clarify that a building can be 'dangerous' where the relevant risks arise from after-shocks stemming from an earthquake that has triggered a state of national or local emergency. This would effectively be a new limb of the statutory definition of a 'dangerous building', which would be an exception to the usual position that earthquake-related performance is excluded from consideration under section 121.

18. Should resource and building consent processes be followed in these situations? Why / Why not?

Yes, although WCC notes the application of section 41(1)(e) of the Building Act. In these non-emergency situations building owners should remain in control of the management of their buildings and they will have sufficient time to obtain any necessary consents.

19. Is three years after a state of emergency an appropriate timeframe for these powers? If not, what would you suggest is an appropriate timeframe?

If the power was to be provided, then WCC considers that the 3 year timeframe is appropriate. If a longer timeframe was required then the event is likely to be so large that special empowering legislation would be required.

Appeals

Proposal 10: Appeals

Appeals to the Chief Executive of MBIE about territorial authorities' building actions or omissions will be available in most situations.

Building owners will be able to apply for a determination against territorial authorities under section 177 of the Building Act regarding the use of building emergency management powers in most situations.

To help ensure your feedback is understood, when answering the question please provide evidence and/or examples for your response where possible.

- 20. *The appeal rights are intended to protect people from life-safety risks, by allowing territorial authorities to manage unusable buildings whilst not interfering with private property rights more than is absolutely necessary. Do the appeal rights have the correct balance between life-safety risks and private property rights? Why / why not?***

The discussion document states that the 'proposed appeal process is the same process currently available for other decisions under the Building Act, including decisions relating to dangerous buildings'. The Council notes that the proposed process (ie to the Chief Executive of MBIE through the determination process) is quite different to that arising under sections 129 and 130 of the Building Act, which provide for retrospective validation of territorial authority decisions and actions by the District Court (in the absence of agreement from the building owner).

The Council considers that the retrospective nature of the section 129/130 process should be applied to the use of building emergency management powers, insofar as they relate to the placement of placards on buildings or the taking of steps to remove or mitigate significant life-safety risks or dangers causing significant economic disruption. This could result, for example, in a decision to change the colour of a placard, without holding up the initial assessment and placard placement process.

To assist with the resolution of any appeals/challenges to territorial authority decisions, the Council considers that any legislation should provide clear guidance as to the appropriate balance between the various competing factors that might be at play (eg public safety concerns, private property rights, broader economic concerns, heritage and amenity issues).

Liability

Proposal 11: Liability

Territorial authorities and assessors authorised by the territorial authority, will be under no liability arising from any action that they take in good faith under building emergency management powers.

To help ensure your feedback is understood, when answering the question please provide evidence and/or examples for your response where possible.

21. Is it appropriate that territorial authorities and assessors are not liable for any action under the building emergency management powers for actions taken in good faith? Why / Why not?

Yes. The Council considers that immunity is appropriate in order to ensure that territorial authorities, or officers exercising delegated powers, are not unduly inhibited when making urgent, difficult decisions on the basis of (often) limited information. Delays caused by risk-averse decision-making would undercut the legislative objective and could potentially have tragic consequences, given the risks being addressed.

The Council notes that it has experience exercising the quite invasive power provided in section 129 of the Building Act. It is always been able to justify its decisions and actions in the Court validation processes associated with that provision. The Council is confident that territorial authorities and their officers are familiar with the need to exercise emergency powers fairly, reasonably and in accordance with the statutory purposes for which they are provided.

Costs

Proposal 12: Costs

Owners will be liable for most costs associated with the building emergency management powers. Territorial authorities have the power to recover costs from owners for any work done. Territorial authorities are responsible for the costs of the initial rapid building assessments and for cordons and restrictive measures for up to three months after the state of emergency has been lifted.

To help ensure your feedback is understood, when answering the question please provide evidence and/or examples for your response where possible.

22. Is it appropriate for building owners to be liable for costs associated with the building emergency powers? Why / Why not?

Yes. The Council considers that the proposal allocation of costs between territorial authorities and property owners is appropriate.

However, the Council considers that an aspect of the cost allocation proposal needs to be clarified. Namely, it is unclear whether an owner becomes liable for all existing and future costs of protective measures that have been in place for 3 months or more, or whether they will only bear the future costs going forwards from the 3 months point.

Either way, the Council considers that it would be appropriate to clearly express:

- whether an owner has the ability to challenge the nature and scale of protective measures (such as cordons) that are in place once the 3 months threshold is crossed
- how costs should be apportioned between building owners where protective measures relate to multiple buildings
- whether there is a point where the cost of widespread protective measures - such as large area cordons - should be covered by territorial authorities beyond the 3 months threshold.

Compensation

Proposal 13: Compensation

Owners will be liable for most costs associated with the building emergency management powers, but can seek compensation for actions where the action caused disproportionately more harm than good.

To help ensure your feedback is understood, when answering the question please provide evidence and/or examples for your response where possible.

23. Are the compensation proposals appropriate? Why / Why not?

No. The Council considers that an approach similar to that set out in sections 129 and 130 of the Building Act should apply. It is an implicit part of that process that the District Court (or potentially some other decision-maker, if the general approach is imported in relation the building emergency management powers) will review the appropriateness of territorial authority decisions and actions, which will then affect the degree of costs that a territorial authority can recover from building owners.

The inclusion of a new threshold in that regard - ie whether the ratio of harm to good is disproportionate - would require careful evaluation.

The Council also considers that a sufficient disincentive to arbitrary, capricious, or ill-considered decision-making is provided through the limits on the statutory immunity discussed elsewhere.

Offences

Proposal 14: Offences

It will be an offence, with a fine of up to \$5,000 for an individual and \$50,000 for a body corporate, to interfere or not comply with protective measures and placards.

It will be an offence, with a fine of up to \$200,000, not to comply with a notice to remove danger, or to use a building in breach of the directions on a placard.

To help ensure your feedback is understood, when answering the question please provide evidence and/or examples for your response where possible.

24. Where there is interference or non-compliance with protective measures and placards, is a fine of up to \$5000 for an individual and up to \$50,000 for a body corporate appropriate? Why / Why not?

Yes. The proposed fine for an individual is consistent with section 368 of the Building Act.

The Council also notes that there is no indication as to whether the offence will require an element of intention (eg wilful interference with a notice), but assumes this will be addressed in any proposed legislation.

25. *Is a fine of up to \$200,000 appropriate for not complying with a notice to remove danger, or using a building in breach of the directions on the placard? Why / Why not?*

Yes. This is consistent with the maximum penalty applicable to analogous notices under section 128A of the Building Act.